
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: April 19, 1995
CASE NO. 89-ERA-38

IN THE MATTER OF

JOHN DELCORE,
COMPLAINANT,

v.

W.J. BARNEY CORP. AND THE CONNECTICUT LIGHT AND POWER CO. d/b/a NORTHEAST UTILITIES SERVICE CO.,
RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Complainant John Delcore brings the captioned complaint of unlawful discrimination against Respondents under Section 210 (employee protection provision) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988).[1] The complaint alleges that Respondents violated ERA Section 210 while negotiating settlement of a court action filed against them by Complainant. In particular, Respondents offered Complainant a monetary settlement in exchange for his agreement to restrict his participation in future regulatory proceedings. Respondents subsequently broke off negotiations because Complainant refused to agree to the restriction.

The Section 210 discrimination complaint was submitted to the Administrative Law Judge (ALJ) on a stipulated record. In his April 24, 1990, Recommended Decision and Order Dismissing Complaint (R.D. and O.), the ALJ determined that the case should be dismissed because he lacked jurisdiction, the complaint was untimely, and Respondents did not retaliate against Complainant. I disagree. Accordingly, the ALJ's decision is rejected. I emphasize at the outset, however, that the circumstances that gave rise to this

discrimination complaint are not now prevalent in the nuclear industry due to intervening regulation. Regardless, I am constrained to address the discrete issues raised by the complaint based on the stipulated record.

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FACTUAL BACKGROUND

For a two-year period, ending with his discharge in September 1987, Complainant John Delcore was employed as an electrical foreman by Respondent W.J. Barney Corporation (Barney). Delcore was assigned to the Millstone Nuclear Power Station in Waterford, Connecticut, where Barney had contracted with Northeast Nuclear Energy Company (NNECO) to perform electrical maintenance. Delcore was discharged after he complained internally that NNECO had engaged in unauthorized work procedures which allegedly violated Nuclear Regulatory commission (NRC) regulations. September 29, 1989, Stipulation of Facts (Stip.), Exhibit (Exh.) 4 at 13-14, Exh. 5.

Following his discharge, Delcore complained to Barney, NNECO, and the NRC about safety violations at the Millstone Station. Delcore's contact with the NRC was ongoing from late 1987 to at least mid-1988 and is documented in NRC correspondence and inspection reports. Stip., Exhs. 1-4.

In late 1988, Delcore filed a court action against Barney and Respondent Connecticut Light and Power Company (CL&P)[2] in which he alleged wrongful termination of employment in violation of public policy, tortious interference with his employment contract, and defamation associated with his discharge.[3] In early 1989, Barney and CL&P offered to settle the court action. Their proposed settlement agreement provided that, in exchange for $15,000, Delcore would agree --

(1) to refrain from seeking future employment with CL&P, Barney, or "any of their related companies or organizations, successors or assigns;"

(2) to refrain from appearing voluntarily as a witness or party in any judicial or administrative proceeding to which CL&P, Barney, or any related company or organization was a party;

(3) to refrain from suggesting that "any other party, attorney, administrative agency, or administrative or judicial tribunal..... contact, involve, or call [him) as a witness or . . . join [him] as a party,, in any proceeding to which CL&P, Barney, or any related company organization was a party;

(4) to notify CL&P and Barney immediately if served with compulsory process seeking to compel his appearance or joinder in such a proceeding;

(5) to resist such compulsory process, including by means suggested by CL&P and Barney;[4]

(6) to communicate with the NRC only about conditions that he

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believed "in good faith" could affect "the public health and safety" and only if the purpose of the communication was "to provide the NRC with information necessary to the discharge of its duties;"

(7) to refrain from bringing to the attention of anyone other than NRC inspectors "the fact and substance" of his NRC communications;

(8) to refrain from making any public statement, regarding knowledge that he had acquired during his tenure at the Millstone Station, which contained allegations, accusations, or intimations of wrongdoing by CL&P, Barney, related companies or organizations, or their managers or employees;[5]

(9) to engage in confidential arbitration to resolve any allegations that the settlement agreement had been breached. Stip. at 4-6, Exh. 6 at 6-14.

Delcore objected to these restrictions and countered that they should be stricken from the agreement. Stip., Exh. 7. CL&P and Barney thereafter broke off settlement negotiations, explaining that "the changes to the proposed settlement agreement that [Delcore) has demanded suggest that further settlement discussions will not prove fruitful." *Id.*, Exh. 8.

DISCUSSION

A. The Legal Standard

To prevail on whistleblower complaints, complainants must establish that the respondents took adverse action against them because they engaged in activity protected under the ERA. In the event that complainants demonstrate that the respondents took adverse action *in part* because they engaged in protected activity, the burden shifts to the respondents to demonstrate that the complainants would have been disciplined even *if* they had not engaged in protected activity. *Mackowiak v. Univ. Nuclear Sys., Inc.,* 735 F.2d 1159, 1164 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-46, Sec. Dec., Feb. 15, 1995, slip op. at 8-12. Section 210(a) of the ERA provides:

> No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954..... or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954..... (2) testified or is about to testify in any such

> proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954 . . . .

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42 U.S.C. § 5851(a). Delcore complains essentially that the ERA accords him statutorily-protected participation rights; that, in making their settlement offer, Respondents unlawfully attempted to coerce him to relinquish these rights, *i.e.*, attempted to buy his silence; and that Respondents retaliated against him by breaking off settlement negotiations because he refused to relinquish his rights.

B. Employee Status

The ERA protects "employee[s]" from employer retaliation. Consequently, the question arises whether Complainant Delcore, who had been discharged over a year before the alleged discrimination, forfeited protection because he was no longer employed.

Under analogous employee protection provisions, the term "employee" consistently has been construed "broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship." *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div.,* 821 F.2d 1085, 1088 (5th Cir. 1987). *See Charlton v. Paramus Bd. of Educ.,* 25 F.3d 194, 198-200 (3d Cir. 1994) (Title VII, Civil Rights Act of 1964); *Passer v. American Chem. Soc'y,* 935 F.2d 322, 330-331 (D.C. Cir. 1991) (Age Discrimination in Employment Act); *Sherman v. Burke Contracting,* Inc., 891 F.2d 1527, 1531-1532 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990) (Title VII); *E.E.O.C. v. J.M. Huber Corp.,* 927 F.2d 1322, 1331 and n.41 (5th Cir. 1991); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162, 1165-1166 (10th Cir. 1977); *Dunlap v. Carriage Carpet Co.,* 548 F.2d 139, 147 (6th Cir. 1977) (Fair Labor Standards Act); *Hayes v. McIntosh,* 604 F. Supp. 10, 19 (N.D. Ind. 1984); *Bonham v. Copper Cellar Corp.,* 476 F. Supp. 98, 103 (E.D. Tenn. 1979); *Marshall v. Seminole Distributors, Inc.,* 81 Lab. Cas. (CCH) ¶ 33,514 (N.D. Fla. 1977); 29 C.F.R. § 24.2(b) (1994)(under whistleblower regulations, retaliatory blacklisting, which may be directed against former employees, is prohibited).

Here, Delcore's court action clearly arose out of his employment relationship with Respondents and concerned protected activity which allegedly resulted in the termination of the relationship. Respondents sought to conclude the court action by making the settlement offer and broke off negotiations when Delcore refused to relinquish his Section 210 participation rights. I find that Delcore was a protected "employee" under the ERA for purposes of the instant complaint.

C. Discrimination Complaint

The "gag" provisions contained in the settlement offer at issue were particularly restrictive. They would have prevented Delcore from appearing as a witness voluntarily and from encouraging others to call him as a witness or join him as a party; and they would have required him to resist compulsory process. They also would have restricted his communication with the NRC. These provisions clearly were contrary to public policy and consequently would have been unenforceable. *Polizzi v. Gibbs & Hill, Inc.,*

Case No. 87-ERA-38, Sec. Ord., Jul. 18, 1989 (settlement provision restricted access by government regulators to information complainant may have been able to provide relevant to the administration and enforcement of the ERA; its effect would be to dry up channels of communication essential for regulators to carry out their responsibilities).[6] The issue raised here, however, is whether Respondents violated ERA Section 210 by conditioning settlement on acceptance of the restrictive provisions.

Following the Secretary's decision in *Polizzi v. Gibbs & Hill*, the NRC, in 1990, promulgated a regulation prohibiting restrictive settlement provisions. It provides:

> No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

10 C.F.R. § 50.7(f)(1994). (The referenced protected activity includes, but is not limited to, providing the NRC with information about possible violations, requesting the NRC to institute regulatory action, and testifying in any NRC proceeding.) The NRC provided that the regulation would apply to all agreements affecting employment, noting the existence of restrictive settlement agreements in cases filed on a variety of grounds in State and Federal courts. The NRC "concluded that these agreements adequately demonstrate the potential for impeding the flow of information to the Commission through avenues other than section 210 agreements." 55 Fed. Reg. 10,399 (1990).

In a May 1989 memorandum to the NRC, its general counsel addressed the issue whether a settlement agreement in which an employee protected under ERA Section 210 voluntarily relinquishes his right to initiate or testify in an adjudicatory proceeding in exchange for financial consideration violates "applicable laws." 135 Cong. Rec. 27,836 (1989). He notes that "Section 210, as a matter of national policy, provides special protection to employees or former employees who engage in the activities protected by Section 210(a)," *id*., and concludes that relinquishing these rights would be illegal as "contrary to the public policy objectives of the freedom to engage in the Section 210(a) protected activities." *Id*. at 27,837. This memorandum was submitted in clarification of

an earlier April 1989 memorandum addressing the same issue in which the NRC general counsel "concluded that a Section 210 settlement agreement which imposes such restrictions is both clearly contrary to the policy objectives of the Atomic Energy Act of 1954..... and the overarching objective of (ERA] Section 210. . . ." *Id*. at 27,838.[7]

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The memoranda add that any agreement to waive the right to initiate an action or testify would be illegal even if it left intact the employee's right to contact the NRC.

> Initiating and testifying in NRC proceedings are explicitly identified as protected activities in Section 210 . . . and that section does not suggest that these activities may be infringed so long as other, unspecified activities remain unrestricted. It would be anomalous to read Section 210 as allowing licensees, applicants, or contractors to "buy out" of the NRC hearing process by contracting with employees who are potential intervenors or witnesses. Therefore, I read Section 210 as . . . prohibiting agreements not to initiate or testify in adjudicatory proceedings, even when there remains a right to go directly to [NRC] staff.

135 Cong. Rec. at 27,837.

Also persuasive is analysis under the analogous employee protection provision of the Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(1988). In *Secretary of Labor on behalf of Keene v. Mullins,* 888 F.2d 1448 (D.C. Cir. 1989), the court held that a mine operator's offer to rehire a complainant under illegal and unsafe conditions constituted a violation of the Act separate from the complainant's unlawful discharge for complaining about those same conditions. The court noted that the Mine Act was to be construed expansively to ensure that miners were not inhibited from exercising rights afforded by the Act including the right to refuse to work under unsafe or unhealthful conditions and determined that the offer to reemploy the complainant only under unsafe conditions deprived him of that right.[8] In the instant case, Respondent's settlement offer similarly would have deprived Complainant Delcore of his participation rights under the ERA. *See Mackowiak v. Univ. Nuclear Sys., Inc.,* 735 F.2d at 1163 (ERA whistleblower provision "is modeled on, and serves an identical purpose to" the Mine Act's predecessor; they share a broad remedial purpose and should be construed expansively).[9]

Accordingly, under the analysis in *Mullins,* the offer to pay a complainant to relinquish statutory rights would violate the statute. In *Mullins,* the mine operator offered the complainant employment and its associated compensation in exchange for relinquishing his work refusal rights. Here, Respondents offered Delcore $15,000 in exchange for relinquishing his participation rights.[10] Indeed, these circumstances are not far removed from an employer's offer not to interfere with an employee's future employment, *i.e.*, offer not to blacklist him, in exchange for his silence concerning the employer's safety

violations. *See* 29 C.F.R. § 24.2(b)(1994) (prohibiting intimidation, threats and coercion motivated by protected activity).

I find, however, that regardless of whether Respondents violated ERA Section 210 by making the settlement offer, they clearly discriminated against Delcore in violation of the Act by breaking off settlement negotiations because he refused to relinquish his

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section 210(a) participation rights. I agree that Respondents have no obligation to settle a claim against them and can under normal circumstances break off settlement negotiations for any reason, or no reason at all. But, here it is uncontroverted that Respondents broke off negotiations because of Delcore's "changes to the proposed settlement agreement," Stip. Exh. 8, which included deletion of the restrictive provisions. *Id.,* Exh. 7. That clearly discriminatory basis cannot be the reason for breaking off settlement negotiations.

ERA Section 210(a) precludes an employer from discharging or *"otherwise discriminat[ing] against* any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [has engaged in protected activity]." 42 U.S.C. § 5851(a) (emphasis added). On the one hand, the Respondents in this case were attempting to negotiate a mutually agreeable termination of Delcore's employment by discussing the settlement of claims arising out of that employment. On the other hand, they immediately curtailed negotiations when Delcore insisted upon retaining his Section 210(a) participation rights. In other words, Respondents discriminated, *i.e.*, made a distinction in their treatment of Delcore, because Delcore engaged in protected activity.[11] Moreover, this treatment was adverse to Delcore because it denied him the means to resolve his claims expeditiously and without the necessity for full litigation.

Respondents thus took adverse action, in part, because Delcore refused to relinquish his participation rights, and they have not demonstrated that they would have broken off negotiations even if he had not rejected the restrictive provisions. Accordingly, Delcore has prevailed on his complaint of unlawful discrimination.

D. Timeliness

Under ERA Section 210, a complainant must file a complaint of unlawful discrimination within 30 days after the violation occurs. Here, Respondents made their settlement offer on February 8, 1989, Delcore rejected the offer's restrictive provisions on March 28, 1989, and Respondents broke off negotiations on April 25, 1989. On May 11, 1989, Delcore filed his discrimination complaint. Delcore's complaint, which was filed within 30 days of the date that Respondents broke off settlement negotiations, is not time-barred.

CONCLUSION

Complainant has established that Respondents engaged in unlawful discrimination in violation of Section 210 of the Energy Reorganization Act of 1974. Accordingly, Respondents are ordered to refrain from discrimination, to post and circulate this decision, and to compensate Complainant for costs and expenses, including attorney fees, reasonably incurred in bringing this complaint. Counsel for Complainant is permitted a period of 20 days from receipt of this decision in which to submit any petition for costs and expenses. Respondents thereafter may respond to any petition within 20 days of its receipt.

SO ORDERED.
ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaint was filed prior to the effective date of the Act. For purposes of this case, I will continue to refer to the provision as codified in 1988.

[2]CL&P apparently does business as Northeast Utilities, the company that owns and operates the Millstone Station.

[3]Delcore alleged that he "had raised concerns about certain safety problems at the Millstone nuclear reactor to supervisory employees of CL&P," that these problems constituted violations of NRC regulations, that he was "terminated by..... Barney and CL&P, at the request of employees of CL&P," and that Barney and CL&P "conspired and acted in concert to discharge (him] for reporting a violation of federal regulations concerning nuclear power plants." Stip., Exh. 5.

[4] Items (2) through (5) applied to activities which "ar[o]se out of, relate[d] to, and concerned" events that occurred prior to execution of the settlement agreement, *e.g.*, events occurring during Delcore's tenure at the Millstone Station and the ensuing NRC investigation of his complaints.

[5]Such a statement made by Delcore prior to January 1, 2004, would have constituted a "material breach" of the settlement agreement relieving CL&P and Barney of any obligation under the agreement and entitling them to recover either a specified percentage of Delcore's $15,000 or their actual damages and attorney fees, whichever amount was greater.

[6]The restrictions on serving as a witness also could be construed as an agreement to suppress evidence.

[7] The Commission subsequently concluded that any agreement which restricted an employee or former employee from communicating about potential violations or other hazards was unacceptable because of its chilling effect on nuclear safety and security. "Any such agreement under which a person contracts to withhold safety significant information or testimony from the [NRC] could itself be a threat to safety and therefore jeopardize the execution of the Agency's overall statutory duties." 55 Fed. Reg. 10,398.

[8]Noting a congressional intent to protect miners against both common and subtle forms of discrimination, the court commented that "[a]n offer of reemployment conditioned on a miner's willingness to work under dangerous conditions of which a miner has previously complained surely qualifies as a more subtle form of discrimination." 888 F.2d at 1452.

[9]Courts also have held that employers violate the employee protection provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 215(a)(3)(1988), by retaliating against employees who insist upon or refuse to repudiate their right to compensation in accordance with that Act. *Brock v. Casey Truck Sales, Inc.,* 839 F.2d 872, 879 (2d Cir. 1988)("[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act"); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 829 (11th Cir. 1988); *Marshall v. Parking Co. of America-Denver, Inc.,* 670 F.2d 141, 143 (10th Cir. 1982).

[10]In *Mullins,* the mine operator offered to reemploy the complainant after illegally discharging him. Here, Respondents offered Delcore a monetary settlement of illegal discharge claims.

[11]The "voluntary" aspect of settlements notwithstanding, Respondents previously had decided to initiate settlement negotiations and thereafter extended an offer which Delcore did not accept. While Respondents otherwise would not be obligated to continue negotiating, Section 210 mandates that, like any other employment decision, their decision to abandon negotiations not be grounded on an illegal motivation, *e.g.*, Delcore's protected activity.